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In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

NO. 303

SHELDON M. GRENGS,

Petitioner,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, FOX WISCONSIN THEATRES, INC., FOX VALLEY THEATRES CORPORATION, FOX WISCONSIN AMUSEMENT CORPORATION, WAUSAU THEATRES COMPANY, LOEW'S, INCORPORATED, RKO RADIO PICTURES, INCORPORATED, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, PARAMOUNT FILM DISTRIBUTING CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION,

Respondents.

REPLY BRIEF FOR PETITIONER

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1956—Northwest Brief Printing Co., Minneapolis 15, Minn.

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We pointed out in our Petition that *Wogahn v. Sterens*, 236 Wis. 122, held that the character, as penal or remedial, of a federally created cause of action would be determined in its courts according to the decisions of federal courts. This is in accord with *Prudence Realization v. Geist*, 316 U.S. 89, that "in the interpretation and application of federal statutes, federal not local law applies."

Despite this command of both the State Court and of this, the U. S. Supreme Court, the court below held the Clayton action penal, without giving a reason for its decision, and

notwithstanding the decisions of every other U. S. Court of Appeals to the contrary.

What we failed to note was that the 84th Congress has also noted the need for uniformity in the enforcement of the Clayton Act, by providing a uniform four-year limitation to the Clayton actions by enacting, on July 7th, 1955, Ch. 283, Sec. 1, 69 *Stats.* 283, being 15 *U.S.C.*, Secs. 15(b) and 16(b). By its terms the amendment was not to be effective for six months; and in any event it is not applicable to the present action. *Ochoa v. Hernandez*, 230 U.S. 139.

Since we were not told by the court below how it arrived at its conclusion that the Clayton action is a penalty,[1] we are forced to speculate.

The court lays down two postulates for its decision: (1) that the Clayton action is a penalty; (2) that the word "penalty," as used in the two-year section, is something different from the word "forfeiture," and is not modified by the qualifying phrase, "when the action is given to the party prosecuting therefor and the state."

Both postulates are necessary to its decision. One alone is not sufficient; for if the Clayton action is not a penalty, the two-year statute is concededly not applicable.

Since there are no Wisconsin decisions holding multiple damage actions within the two-year section, as there are in Illinois (involved in *Hoskins v. Truax*), the Court must have adopted the view urged upon it that the action was a penalty because Wisconsin characterized statutory multiple damages as punitive and "penalties." In so doing, it ignored

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[1]In Sun Theatre Co. v. R. K. O., 213 F.2d 284, and Schiffman v. Texas, 196 F.2d 695, the same Court disclaimed that in deciding Hoskins v. Truax, 191 F.2d 912 (cert. den. 342 U.S. 947), it had intended to hold the action was penal within federal definition, but had so decided solely because the Illinois Supreme Court had held all treble damage actions within its two-year statute. There are no such decisions in Wisconsin.

Wisconsin's Survival Statute, under which actions carrying multiple damages given by Wisconsin's statutes for conversion, obstructing water courses, forcible entry and detainer, and other injuries to property, all of which survive with the multiple damages included, except as against the executor of defendant (Appendix A, p. 21), and ignored *Killen v. Barnes*, 106 Wis. 560, which tells us that "a penalty dies with the death of either plaintiff or defendant," and tells us "that is elementary, and certainly there is no statute covering the subject" (referring to the Survival Statute).

But if a penalty dies with the death of either party, and does not survive under Wisconsin's Survival Statute as *Killen* tells us, then the Clayton action can not be a penalty because it survives both at common law and under the express terms of the Survival Statute.

Certainly statutory multiple damages do not die with the death of either party in Wisconsin, because Sec. 331.02 says they are only *not* recoverable against defendant's executor. They survive on plaintiff's death. Secs. 331.01 and 331.02 (Appendix A, page 21), which expressly include not only actions "for all damage done to the property rights or interests of another" (such as the Clayton damages), but actions for conversion, recovery of possession or unlawful withholding of real estate, and others, all of which carry statutory multiple damages in Wisconsin, and all of them survive on plaintiff's death, and survive also on defendant's death, but minus the exemplary damages; and all of them obviously governed by the six-year statute, Subs. 5 and 6, under their plain terms. Appendix A, page 20.[2]

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[2]Unless we write in an exception to Subs. 5 and 6, reading, "except when these actions carry multiple damage." This is obviously no more objectionable than writing in commas.

Therefore, multiple damages can't be penalties in Wisconsin, because *Killen* says penalties die, and that the Survival Statute does not cover them; and multiple damages do not die of themselves, except as against defendant's executor, and the action to which they are annexed does not die at all.

In *Hoskins v. Truax*, *Schiffman v. Texas* and *Sun Theatre Co. v. R.K.O.*, this 7th Circuit had answered critics of those cases by stating that the critics had mis-read its decisions; and that it had not decided nor intended to decide that the Clayton action was penal within federal definition; but solely because Illinois had held all multiple damage actions subject to its two-year statute.

Here, then, we have Congress, since, changing the limitation in the direction of achieving uniformity, after a report by the Attorney General and a Committee on the enforcement of the anti-trust laws, pointed out the need for uniformity in limitations and in survival and assignment of these causes of action. (See *U. S. Congressional & Adm. News*, 84th Congress, page 2333, Senate Report No. 619.)

Here are the 2nd, 4th, 6th, 9th and 10th Circuits, all holding the action not penal; and this same Circuit, the 7th, disclaiming in these three recent cases that it had ever intended to hold the action a penalty; would we not rightly expect one word of explanation for the conclusion that the Clayton action has now become a penalty, especially in view of the *Wogahn* case that a federally created cause of action would be construed in Wisconsin courts *as penal or remedial in accordance with the decisions of federal courts?* And in further view of the fact that unless the action is a penalty, the other or second conclusion as to the comma and the use of the "two words" becomes irrelevant.

In discussing its second postulate, as to the kind of penalty to which the statute applies, since it involves the interpretation of Wisconsin statutes, it would seem that Wiscon-

sin decisions are entitled to first consideration.

Here is *Dutton v. Fowler*, 27 Wis. 427, construing the very two words "penalty or forfeiture" under discussion, and referring to the forfeiture there involved, as "the penalty or forfeiture"; and pointing out for us that "the penalty (in referring to the forfeiture) is given to whosoever will sue for it, and not to the person damaged."

Here is a clear definition by the Wisconsin Court that the penalty referred to in these statutes, to which the two-year statute is a limitation, is one given "to whosoever will sue for it," and not to the person damaged. Is the Clayton action given to "whosoever will sue for it"? Title 15, Sec. 15, *U.S.C.*, doesn't say so, nor do the decisions.

Yet, strange as it seems to us, the court below does not even mention *Dutton v. Fowler*.

Here are the very sections of the Wisconsin Statutes to which the two-year section is the obvious limitation, using the two words "penalty" and "forfeiture" in referring to the same liability. But, strange as it seems, the court below does not even refer to them.

Instead, it decides that because the two words are used, it must go back to an 1887 statute to find a comma between the two words, which comma has never been in print either then or since (Appendix B, page 25), and, although the statute was amended in 1931 without the comma, it decides there is an ambiguity, unless the comma be re-inserted—a procedure in direct conflict with a decision of the Wisconsin Supreme Court, where a Revisor's Bill was also involved, where that Court said:

> "We may not go outside the statute to create ambiguity and then resolve the ambiguity by what we have found outside."

The two-year statute (Appendix A, page 20), is plain and unambiguous. It is crystal clear without the comma. It is

consonant as it reads with *Dutton v. Fowler* and the subsequent decisions. It is in harmony with the statutes creating the liabilities. Why does it need interpretation?[3]

The Supreme Court of Wisconsin in these two cases of *Killen v. Barnes* and *Dutton v. Fowler* came to the same conclusions as did the Court of Appeals of New York in the identically parallel cases of *Merchants Bank v. Bliss* and *Grorer v. Morris*. Page 9 of Petition, footnote 5.

In the three cases from Illinois, this Circuit held the Clayton action within its two-year statute, because Illinois held all multiple damage actions governed by it.

But the Wisconsin Supreme Court says that the character of a federally created action must be determined in accordance with federal law;[4] and federal law up to this decision unanimously holds the Clayton action remedial. Wherein is Wisconsin's voice not as potent as that of Illinois?

Dutton v. Fowler says that penalty and forfeiture both mean penalty, and that the penalty is given to whosoever will sue for it. No one can read that case and dispute that. Why wasn't that decision followed?

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[3]In State ex rel. U. S. S. & G. v. Smith, 184 Wis. 309, the Supreme Court of Wisconsin said:

> "If a statute is plain and unambiguous, then interpretation is unnecessary."

[4]Respondents' Brief in Opposition, at page 12, states:

> "Wogahn v. Stevens involved the survivability of a federally created cause of action, an issue which unlike the question here, is governed by federal law."

This is not true. For Wogahn v. Stevens, 236 Wis. at page 128, says:

> "If remedial * * * it survives * * * if penal in its nature and not remedial * * * it did not survive."

That is, the Wisconsin Supreme Court makes its survivability dependent on its penal or remedial character, and that the characterization by federal courts of a federally created cause of action as **penal or remedial** is governing in Wisconsin Courts.

As the Congressional committee report pointed out (Senate Report No. 619), the application of the varying state limitation laws were frequently dependent on the question whether the cause of action according to state law was remedial or penal; so that under identical facts, the action would survive and be assignable in one jurisdiction and die or be non-assignable in the other. Congress set out to cure this evil by providing a uniform limitation. But the evil of "venue shopping" is still unsolved, as the present case points up. For certainly it is arguable that the Court below acted in accordance with both *Wogahn v. Stevens* and *Prudence Realization v. Geist*, and decided *on federal grounds* that the character of the action is penal because of the treble damage provisions; so that we now have the 7th Circuit holding the action penal on federal grounds, and five circuits holding the character of the action remedial; and on identical facts, the action will survive and be assignable in courts following the five circuits, and die or be non-assignable in those following the 7th Circuit.

That problem, involving the interpretation of the law, is peculiarly a function of the courts that only this Court can solve.

The evil of "venue shopping" is still with us; and a corporation forced out of business and desiring to assign its cause of action will be advised to seek an assignee in a venue holding the action remedial. Or if the injured person die, his executor would be advised to bring his action in the jurisdiction holding the action remedial. If Petitioner here dies, his action terminates as to all defendants. But if brought elsewhere, his action would have survived.

Surely the rule should be uniform throughout the United States.

September 5, 1956.

Respectfully submitted,

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